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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

ARTHUR M. HAWKINS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the inquiry for determining proper venue set forth in *United States v. Rodriguez-Moreno* requires that the "nature of the crime charged" be determined solely by the "essential conduct elements" of the offense, with venue proper only in districts where that "essential conduct occurs."

2. Whether venue may be properly based on the effects of a defendant's conduct in a district other than the district in which the acts constituting the offense are committed.

THE PARTIES

The caption in this case contains the name of all parties.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REFERENCE TO OPINIONS DELIVERED BELOW

1. The Seventh Circuit affirmed the District Court's finding in its opinion of August 14, 2003. (See Appendix A).

2. A Petition for Rehearing/ Rehearing En Banc was filed and a subsequent denial of consideration issued on October 10, 2003 and amended on October 14, 2003. (See Appendix B).

JURISDICTION

On August 14, 2003, the United States Court of Appeals for the Seventh Circuit affirmed the Judgment of the United States District Court Order of the United States District Court for the Southern District of Illinois and is reported at 340 F.3d 459. On October 10, 2003, the United States Court of Appeals denied the Petition for Rehearing/Rehearing En Banc amending that order on October 14, 2003 and is reported at 2003 U.S. App. LEXIS 20841 and 2003 U.S. App. LEXIS 21059..

A request for an extension of time within which to file this petition was filed on January 5, 2004. On January 8, 2004, the extension was granted up to and including March 12, 2004.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 10, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1343

18 U.S.C. § 3237(a)

STATEMENT OF THE CASE

Petitioner Hawkins was convicted of one count of conspiracy to commit wire fraud and one count of wire fraud in violation of 18 U.S.C. § 1343 in the Southern District of Illinois on December 19,

2002. Petitioner then appealed his conviction to the Seventh Circuit Court of Appeals, contending *inter alia*, that venue in the Southern District of Illinois for the substantive count of wire fraud was improper, as the underlying wire transfer from a bank in the Eastern District of Pennsylvania to a bank in the Northern District of Illinois, did not originate in, pass through, or terminate in the Southern District. The Seventh Circuit affirmed his conviction on August 14, 2003. Petitioner requested rehearing, and rehearing en banc, which were denied on October 10, 2003. The present petition followed.

FACTS MATERIAL TO THE QUESTIONS PRESENTED

Petitioner was charged in a two count indictment with wire fraud and conspiracy to commit wire fraud for his alleged participation in a bribery scheme that purportedly facilitated distribution of defective batteries.

Petitioner was CEO of Exide Corporation, a battery manufacturer. The case involved the manufacture and sale of Exide batteries as the DieHard batteries sold by Sears.

Specifically, the substantive wire fraud count (Count II of the Second Superceding Indictment) about which Hawkins complains charged Petitioner with causing to be transmitted by wire from an Exide bank account at the CoreStates Bank in Philadelphia, Pennsylvania, wire transfer number B00035879, writings, signs, and symbols representing $10,000 cash to an account maintained at the Bank of Palatine, Illinois, in the name of D. G. Consulting, Inc., Account No. 051-594-01. This wire went to a bank and an account outside the Southern District of Illinois.

Petitioner argued in the trial court and at the Seventh Circuit that venue was not proper in the Southern District of Illinois.

Specifically, Petitioner's contention in support of this argument was that a wire transfer from a bank in the Eastern District of Illinois, did not originate in, pass through, or terminate in the Southern District of Illinois.

The Seventh Circuit held that because Defendants intended to defraud customers in the Southern District of Illinois, wires were used to promote the sale of defective batteries through false advertising in the Southern District of Illinois, batteries were distributed and sold in the district, and an audit of the battery quality conducted in the Southern District of Illinois initially uncovered the defects in the product, venue was proper.

The Seventh Circuit held that these fraudulent activities conducted in the Southern District of Illinois provided critical evidence of the intent to defraud which is an element of the crime of wire fraud.

It is on this basis that Petitioner argues his conviction on Count I should be vacated. Petitioner received a total ten year term, five of which resulted from conviction on this count.

REASONS FOR GRANTING THE PETITION

I. The Lower Court's Ruling Creates a Direct Conflict Between the Permissible Bases for and the Elements of Wire Fraud Requisite for Proper Venue in the Seventh and Ninth Circuits that Can Only Be Resolved by this Court's Clarification of the Law.

A. The Decision Below Concretizes the Conflict Between the Seventh and Ninth Circuits Over the Permissible Bases for

Venue by Explicitly Affirming the Sufficiency of Intended Effects for Proper Venue Thus Rendering the Conflict Ripe for the Court's Review.

The lower court's ruling explicitly confirms the sufficiency of the intended effects of unlawful conduct in a given district to establish venue therein in the Seventh Circuit, *see United States v. Pearson*, 340 F.3d 459, 466 (7th Cir.2003), while the Ninth Circuit has ruled that proper venue for wire fraud offenses under the rubric announced in *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 n.2 (1999), requires a direct connection between the "misuse of wires" and the physical locus thereof. S*ee United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002). Finding that Petitioner's "fraudulent activities in the Southern District of Illinois provided critical evidence of the 'intent to defraud' element" of wire fraud, and that as evidence of a "continuing offense" sufficient under the Seventh Circuit's interpretation of 18 U.S.C. 3237(a) to establish venue in the Southern District for a separate wire fraud count, *see Pearson*, 340 F.3d 459, 466 (7th Cir.2003) (quoting *United States v. Ringer*, 300 F.3d 788, 792 (7th Cir. 2002) ("for continuing offenses "venue is only improper 'if the only acts that occurred in that district do not provide evidence of the elements of the charged crime."), and *United States v. Ochoa*, 229 F.3d 631, 636 (7th Cir. 2000)), the lower court affirmed the Seventh Circuit's "intended effects" test for determining where, other than the physical locus of a crime's commission, venue is proper. With this question not decided in *Rodriguez-Moreno*, 526 U.S. 275, 279 n.2 (1999), the Seventh Circuit adhered to its earlier rulings that venue is proper in a district(s) where "an overt act is intended to have an effect." *Pearson*, 340 F.3d 459, 466 (7th Cir. 2003).

Under this standard, both the intended effects of unlawful conduct and conduct providing evidence of either essential element of wire fraud in a given district are sufficient to establish proper

venue in that district, even if the "use of the wires" at issue bears no physical relationship to that district. The lower court's ruling thus consolidates the law of the Seventh Circuit on two distinct but related issues: (1) the permissible bases for venue (i.e., *locus delicti* and effects of unlawful conduct); and (2) the sufficiency of conduct constituting either "essential element" of wire fraud for proper venue. Crucially, the Ninth Circuit case cited by the lower court in distinguishing the Seventh Circuit's law on the bases for venue also sets forth the Ninth Circuit's position on the second issue, namely, that venue is proper only where the "essential conduct," the "misuse of the wires," occurs. S*ee United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002); *Pearson*, 340 F.3d at 467 n.2 (rejecting the Government's contention that venue is proper in districts "where the defendant's illicit scheme had been concocted."). As the respective standards have been reiterated in the years following Rodriguez-Moreno they have coalesced into concrete rules, and with the lower court's explicit affirmation of the Seventh Circuit's prior decisions in repudiating the Ninth Circuit's doctrine, the conflict between them is now ripe for the review it urgently requires.

A. The Decision Below Also Sharpens Related Conflicts Between the Circuits' Definition of the "Nature of Wire Fraud" and the Relationship Between "Essential Elements" Under *Rodriguez-Moreno* into Justiciable Controversies.

The conflict between the Seventh and Ninth Circuits over the permissible bases for venue accentuates their opposition in two related areas, and as such indicates that conflict between these circuits' venue rules is robust, and as such promises to generate divergent outcomes in a broad range of cases. First, the Seventh and Ninth Circuit's have defined the "nature of wire fraud" and its constitutive conduct in stark opposition; significantly, these distinctions tend to vary the nature of the substantive nature of the

offense in these jurisdictions. The Seventh Circuit defined Petitioner's "crime of wire fraud focused on defrauding and concealing their deceit of consumers." *Pearson*, 340 F.3d 466-67. The Ninth Circuit, in contrast, interpreted *Rodriguez-Moreno* to make the "nature of wire fraud" dependent on "its essential conduct elements," which it identified as "misuse and any acts that cause such misuse of the wires." *Pace*, 314 F.3d at 349-50. The *Pace* court thus concluded that while "a fraudulent scheme may be an element" of the offense, "it is using wires and causing wires to be used in furtherance of the fraudulent scheme that constitutes the prohibited conduct." *Id.*

The distinctive constructions of the "nature of wire fraud" contribute to the divergent rules for localizing its commission. Characterizing Petitioner's "crime of wire fraud as a scheme to defraud consumers and conceal that deceit," *Pearson*, 340 F.3d 466-67, the Seventh Circuit readily identified "fraudulent activities" bearing no connection to the "misuse of wire" count involving Petitioner's wire transfer, and as such, transferring any "intent to defraud" corroborated by conduct in the Southern District of Illinois to the execution of the wire transfer elsewhere. The Ninth Circuit's identification of "misuse of wires" as the "essential nature of wire fraud" similarly undergirds its rejection of conduct pertaining to the "scheme to defraud" as a proper basis for venue. *Pace*, 314 F.3d at 349-50.

While subtle, these distinctions between the circuits' characterization of the "nature of wire fraud" suggest real systemic costs arising from divergent venue rules: namely, in their characterization of the essential "nature of the crime," they expose the significant policy interests served by proscribing conduct. The lower court's characterization of wire fraud "as a scheme to defraud consumers and conceal that deceit," it renders the substantive offenses of wire fraud and fraudulent schemes proscribed elsewhere,

i.e., securities fraud, banking fraud. As such, with this focus, the court imports a solicitous germane for consumer protection but ignores alternative interests germane exclusively to the misuse of wires. In *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001), the Ninth Circuit emphasizes the legislative history of the wire fraud statute in relation to the provisions of the mail fraud statute. 18 U.S.C. § 1343 was enacted, the court explains, to protect the sanctity of the wires as "means" of communication. *Id.* As such, the wire fraud statute is less concerned with the victims of fraudulent schemes than their threat to the nation's communication infrastructure. With the technological developments of modern society, where an increasing portion of the nation's commercial and social transactions rely on use of now various "wires," the importance preserving interests distorted by divergent characterizations of the "nature of the crime" in rules governing venue. Yet this compelling interest cannot be secured in the absence of this court's clarification of the dependence of the "nature of wire fraud" on its essential "conduct elements" implicated by *Rodriguez-Moreno*'s requisite venue inquiry.

Second, as suggested by their definitions of the nature of wire fraud, the circuits are sharply divided by their respective conceptions of the relationship between the "essential elements" of wire fraud requisite for purposes of identifying proper venue(s). The lower court's decision in the instant case illustrates the Seventh Circuit's treatment of "an intent to defraud" and "use of the wires in furtherance of that intent or scheme" as conduct elements whose commission in a given district establishes venue therein; that is, the intent and "fraudulent activities" in furtherance thereof in the Southern District of Illinois established venue in the Southern District, while separate acts of wire misuse may be tried in any district wherein that scheme to defraud is advanced. Clarifying the relationship between the "essential elements" of wire fraud for venue

purposes accentuates the need for clarification of the law manifest in the circuits' definition of the "nature of the crime."

II. The Antagonism Between the Seventh and Ninth Circuits' Venue Rules Is Not a Discrete Conflict But a Significant Controversy Similarly Dividing the Second and Fourth Circuits and Demonstrates the Urgent Need for Intervention by This Court to Clarify the Proper Bases for Venue Under the Sixth Amendment

A. The Conflict Between the Seventh and Ninth Circuits Acknowledged By the Lower Court Similarly Divides the Second and Fourth Circuits and Signals a Genuine Legal Controversy Demanding Clarification by This Court.

While the conflicting rubrics and legal rules adopted by the Seventh and Ninth Circuits itself merits this Court's review, given the constitutional significance of the Sixth Amendment's venue restrictions. The fact that the Second Circuit has adopted an "effects test" similar to that endorsed by the Seventh Circuit, *see United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003) ("venue proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or (2) it is foreseeable that such an act would occur in the district of venue"), while the Fourth Circuit has adopted rules limiting venue to the locus of "essential conduct" closely parallel the "causal connection" to prohibited wire misuse required by the Ninth Circuit, s*ee United States v. Mitchell*, 70 Fed.Appx. 707 (4th Cir. 2003) (citing *United States v. Bowens*, 224 F.3d 302, 309 (4th Cir. 2000), citing *United States v. Cabrales*, 524 U.S. 1 (1998), and *Rodriguez-Mareno*, 526 U.S. 275 (1999), "in support of the proposition that 'venue is limited to the place where the essential conduct elements occur, without regard to the place where other essential elements of

the crime occur"), suggests that the conflict between the Seventh and Ninth Circuit's addressed by lower court's decisions should not be dismissed as a discrete fissure in which this Court should not intervene. Instead, the lower court's decision should be considered in light of the parallel rules in the Second and Fourth Circuits, as a microcosmic illustration of how conflicts between the analytical rubrics which define and structure the legal issues relevant to the identification of the proper venue can cascade into a series of more discrete conflicts among the specific rules which guide the courts' consideration of the relevant legal issues as they arise in the facts of concrete cases. In doing so, the need for and propriety of this Court's intervention to clarify whether venue is proper only where the essential conduct elements of the offense occur, if not, whether venue is proper only where both the conduct and circumstantial elements of the offense occur, and finally, whether venue is proper where unlawful conduct in another district generates effects.

B. The Current Division Between the Circuits Has Significant Institutional Costs Justify Intervention By This Court and Counsel Immediate Action.

Absent this Court's authoritative intervention in controversy currently fragmenting the federal circuits as a result of the now pointedly antagonistic doctrinal rubrics and corresponding rules governing venue currently fragmenting the federal circuits, controversies festering of two salient issues not decided in *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999), the circuit-specific venue rules it left undisturbed will continue to influence appellate courts' analyses under the *Rodriguez-Moreno* inquiry while intensifying now *direct* conflicts between the circuits over antagonistic tests not previously scrutinized. In fact, the Seventh Circuit's ruling in the instant case illustrates the balkanization of

venue law as lower courts have integrated the *Rodriguez-Moreno* inquiry, 526 U.S. at 270, into the framework of the circuits' preexisting venue rules. The survival of these jurisdiction-specific venue rules is, in essence, an artifact of the *Rodriguez-Moreno* Court's cautious deferral of these questions; the first, not properly before the Court, and the second, though entailed by the Court's venue analysis, was not yet ripe for decision. Petitioner Hawkins thus urges the Court to grant review in order to consider the issues now sharply dividing the appellate courts and squarely presented for its consideration by the lower court's ruling.

CONCLUSION

Petitioner Hawkins respectfully appeals to this Court's unique institutional competence to determine "what the law is," *Marbury v. Madison*, 5 U.S. 137 (1803), and to ensure that level of coherence among lower courts required by a nation governed by the rule of law, in requesting that the Court grant his petition for review in the instant case. Petitioner urges that the constitutional and cultural importance of a coherent law of venue in a nation increasingly dependent on use of the wires for completion of its commercial and cultural projects should not be undervalued. *Cf. United States v. Saavedra*, 223 F.3d 85, 86 (2d Cir. 2000) (constitutional venue restrictions were "intended to afford an accused the protection of being tried...where...physically present when the crime was committed...But in today's wired world of telecommunication and technology, it is often difficult to determine exactly where a crime was committed, since different elements may be widely scattered in both time and space, and...may not coincide with the accused's actual presence."). This Court's review of a decision that explicitly announces a direct conflict between the analytical tests for determining proper venue in wire fraud cases in the Seventh, Second,

Ninth, and Fourth Circuits also promises socially desirable systemic benefits.

The appellate courts' markedly divergent interpretations of this Court's decision in *Rodriguez-Moreno*, 526 U.S. 275, and the antagonism between the circuits' doctrinal frameworks made evident by the lower court's explicit rejection of the "causal and direct connection to misuse of wires" test endorsed by the Ninth Circuit, forecloses reasonable expectation that cases arising in the short- or intermediate-term will permit resolution of this conflict at the appellate court level. While Petitioner is sensitive to the Court's institutional reluctance to issue mandates displacing latitude conventionally reserved to lower courts to fill gaps and resolve ambiguities in the law more organically, the antagonism between the venue laws of the respective circuits are sufficiently acute to justify the Court's exercise of its institutional power in the interest of systemic uniformity in an area of law increasingly influential in the social and commercial projects of a range of societal actors. Moreover, the compelling considerations *ordinarily* incumbent upon this Court in its role as arbiter of conflicts among the lower courts *intensified* by the urgent need for resolution of this legal controversy before it creates undesirable risk aversion among technological innovators and commercial enterprises. The convergence of constitutional and institutional interests in resolution of the conflict dividing the laws governing venue in the Seventh, Second, Ninth, and Fourth Circuits, Petitioner urges the Court to review the questions presented by the instant case.

For the reasons expressed in the foregoing, Petitioner Hawkins by and through undersigned counsel, respectfully requests that the Court grant his petition for review in the present case.

Respectfully submitted,

Susan G. James, Esq.
Counsel of Record for Arthur M. Hawkins

APPENDIX A

United States Courts of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 10, 2003

Before

Hon. Ilana Diamond Rovner, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

Nos. D3-100S, 03-1232

United States of America	
Plaintiff-Appellee,	**Appeals from the United States District Court for the Southern District of Illinois**
v.	**No. 01 CR 30006**
Arthur M. Hawkins,	
Defendant-Appellant.	**David R. Herndon, *Judge***

ORDER

On consideration of the petition for rehearing and rehearing en banc filed by counsel for Mr. Hawkins on August 28, 2003, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.

Accordingly, the petition for rehearing is DENIED.

United States Courts Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
October 14, 2003

Before

Hon. Ilana Diamond Rovner, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

NOS. D3-100S, 03-1232

United States of America
Plaintiff-Appellee,

Appeals from the United States District Court for the Southern District of Illinois

v.

NO. 01 CR 30006

Arthur M. Hawkins,
Defendant-Appellant.

David R. Herndon, *Judge.*

AMENDED ORDER

On consideration of the petition for rehearing and rehearing en banc filed by counsel for Mr. Hawkins on August 28, 2003, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.[1]

Accordingly, the petition for rehearing is DENIED.

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[1]Chief Judge Joel M. Flaum and Judge Kenneth F. Ripple took no part in the consideration of this case.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 02-4356, 03-1005 & 03-1232

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS N. PEARSON and
ARTHUR M. HAWKINS,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois.
No. 01 CR 30006—**David R. Herndon**, *Judge.*

ARGUED MAY 27, 2003—DECIDED AUGUST 14, 2003

Before ROVNER, DIANE P. WOOD, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.* Arthur Hawkins and Douglas Pearson were convicted of wire fraud and conspiracy to commit wire fraud based on their participation in a bribery scheme that facilitated the distribution of their company's defective batteries. Hawkins and Pearson appeal their convictions, arguing, among other things, that they should not have been tried on a superceding indictment that was filed outside the relevant statute of limitations, their case should not have been tried in the Southern District of Illinois, they were prejudiced by certain discovery

rulings of the district court, and the district court improperly limited their ability to examine a key witness at trial. We reject all of their arguments and affirm the judgment of the district court in all respects.

I. BACKGROUND

Arthur Hawkins and Douglas Pearson were officers of Exide Corporation, a battery manufacturer. Hawkins was the CEO and Chair of the Board of Directors, while Pearson served as Executive Vice President of Sales and Marketing and later as President of North American Operations. In 1993, Exide bid on a contract to manufacture DieHard batteries for Sears. Exide's bid contained a promise of "space age technology," and it stated that Exide's DieHard batteries would contain silvium II (silver additive), high utilization paste, and one-inch breed lugs. In April 1994, Exide was awarded the DieHard contract.

Despite Exide's promises, the batteries it manufactured contained only trace amounts of silver, the high utilization paste did not add any value to the battery, and the one-inch lug created a design flaw. As early as October 1994, soon after the batteries were rolled out in Sears stores, Exide officials were warned of significant quality problems with the batteries. As a result, Sears indicated to Exide that it was in jeopardy of losing the DieHard business. By the end of October, Exide went into approximately 700 stores nationwide to remove defective batteries from the shelves.

In order to keep the lucrative Sears contract, Exide bribed Gary Marks, Sears's battery buyer. Beginning in March 1995 and continuing through February 1996, Exide made several payments of approximately $10,000 each to Marks. At first, Joseph Calio, Senior Vice President of Sales and Marketing for Exide, gave the bribes to Marks. After Calio complained about making the payments, Exide sent the bribes to Marks's phony consulting company,

DG Consulting, by check or wire. Marks left Sears in July 1997.

In April 1998, Hawkins informed Marks that Calio had implicated Marks in an investigation by the Florida Attorney General's Office into the Exide bribery scheme. In order to cover up their arrangement, Hawkins and Marks concocted a phony consulting agreement between Exide and DG Consulting and created supporting backdated documents to substantiate the bribe payments. Hawkins paid Marks $15,000 in spring of 1999 and an additional $10,000 later that fall for Marks's participation in the cover-up scheme and for his execution of the false cover-up documents.

In January 2001, Hawkins and Pearson were charged in a two-count indictment with wire fraud and conspiracy to commit wire fraud. The indictment, which was filed under seal, charged that the batteries failed testing standards and that Exide falsified internal quality assurance reports to hide latent manufacturing defects. It also charged that Exide supplied the defective batteries to Sears distribution centers, causing defective batteries to be distributed nationwide to consumers, and defendants failed to recall batteries that were known to be defective. In addition, there were allegations that Exide falsely advertised that the batteries were manufactured with certain "proprietary features" when the batteries either did not contain the features or they added nothing to the durability or quality of the batteries. Finally, according to the indictment, after the defective batteries were in the stores, defendants made unlawful payments to Marks in an attempt to influence his independent judgment and to promote the business arrangement with Sears, and then concealed the unlawful

payments by causing corporate financial records to be falsified.[1]

After the original indictment was returned against Hawkins and Pearson in January 2001, two superceding indictments were filed in open court in March 2001, then in July 2001. Hawkins and Pearson were tried on the second superceding indictment beginning on March 18, 2002. Following approximately three months of trial, a jury convicted Hawkins and Pearson on both counts. Hawkins was sentenced to 120 months' imprisonment, a three-year term of supervised release, and a fine of $1 million, while Pearson received a sentence of 64 months' imprisonment, a two-year term of supervised release, and a fine of $150,000. Defendants appeal.

II. ANALYSIS

Hawkins and Pearson have taken a kitchen-sink approach to their appeal, filing separate briefs (with voluminous appendices) and together raising over a dozen distinct issues, each with their own sub-contentions. Neither challenges the sufficiency of the evidence to support their conviction. In the face of the avalanche of issues they have raised, we will focus here on defendants' most substantive contentions.

---

[1] In March 2001, Marks and Calio pled guilty to wire fraud and signed plea agreements with the government. In December 2001, Sears Automotive Marketing Services, Inc., a subsidiary of Sears, entered into a pretrial diversion agreement in which the U.S. Attorney's Office agreed not to prosecute it in exchange for a payment of $62.6 million.

A. Superceding Indictment

Defendants first argue they were tried under a second superceding indictment that, because it was returned outside the statute of limitations period and did not relate back to the original indictment, was time-barred. We review the district court's ruling regarding the statute of limitations de novo. *United States v. Anderson*, 188 F.3d 886, 888 (7th Cir. 1999). The original indictment against defendants, which included a wire-fraud count for the wiring of money on January 31, 1996, was filed January 19, 2001, within the five-year statute of limitations. *See* 18 U.S.C. § 3282. Subsequently, a first superceding indictment was returned on March 22, 2001, and a second superceding indictment was returned July 19, 2001. Although only the original indictment was filed within the five-year limit, "a superceding indictment that supplants a still-pending original indictment relates back to the original indictment's filing date so long as it neither materially broadens nor substantially amends the charges initially brought against the defendant." *United States v. Ross*, 77 F.3d 1525, 1537 (7th Cir. 1996). Defendants have two statute of limitations complaints about the indictments: the original indictment was filed under seal and the later indictments do not relate back to the original indictment.

We first address defendants' concern that the original indictment was sealed. Defendants argue that despite the fact that filing an indictment within the statute of limitations period tolls the running of the statute of limitations, it should not have been tolled in this case because the original indictment was filed under seal. Federal Rule of Criminal Procedure 6(e)(4) provides that a court "may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial." Rule 6 does not require the statute of limitations analysis to be altered when an indictment is sealed, and we see no reason why, in a case such as this where an open indictment was filed only

two months later, the statute of limitations should continue to run after a sealed indictment has been returned. *See United States v. Thompson*, 287 F.3d 1244, 1251 (10th Cir. 2002); *United States v. Edwards*, 777 F.2d 644, 647 (11th Cir. 1985); *United States v. Watson*, 599 F.2d 1149, 1154 (2d Cir. 1979).

Hawkins also complains that because the original indictment has remained under seal, his counsel has never been able to determine whether the first superceding indictment relates back to the original indictment. The district court conducted an *in camera* comparison of the original indictment to the first superceding indictment and determined that the only difference between the two was the removal in the latter of the identity of an unindicted coconspirator. Our review confirms this minor change, which, since it does not alter or amend the charges against the defendants in any way, does not offend the statute of limitations.

This is not to say, however, that it was proper for the indictment to indefinitely remain under seal in the district court. Pearson and the government acknowledge that the identity of the coconspirator named in the original indictment has been publicly revealed. This court has repeatedly recognized the paramount importance of providing public access to court proceedings, especially in criminal matters. *See, e.g., In re Associated Press v. Ladd*, 162 F.3d 503, 509-10 (7th Cir. 1998); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). At the very least, once the identity of the unindicted coconspirator became known, the indictment should have been unsealed, and it is, as of this date, unsealed.[2]

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[2] We remind litigants that under Seventh Circuit Operating Procedure 10, "[e]xcept to the extent portions of the record are required to be sealed by statute . . . every document filed in or by

(continued...)

Defendants' second statute of limitations argument is that changes made to the conspiracy count in the second superceding indictment materially broadened the charge, preventing it from "relating back" to the original indictment, and leaving it time-barred. The second superceding indictment modified the end date of the conspiracy from February 1996 to September 2000 and added three overt acts which occurred during that time. Defendants argue that the three acts—Hawkins's preparation of Marks's false affidavit, his preparation of a phony consulting agreement, and his false testimony about the consulting agreement—were not part of the wire fraud conspiracy and thus expanded the alleged crime. However, "the fact that the 'central objective' of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy." *United States v. Hickey*, 360 F.2d 127, 141 (7th Cir. 1966). Here, the uninterrupted success of the conspiracy turned on defendants' ability to continuously conceal the truth about the defective batteries from consumers and Exide shareholders. Hawkins's acts to prop up the scheme were an integral part of the continuing actions of deceit. We find that defendants were on notice of the charges pending against them because "the initial indictment informed appellant[s] in no uncertain terms that [they] would have to account for essentially the same conduct with which [they were] ultimately charged in the superceding indictment," *United States v. O'Bryant*, 998 F.2d 21, 24 (1st Cir. 1993), and therefore the second superceding indictment did not violate the statute of limitations.

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[2] (...continued)
this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by . . . this procedure."

B. Venue

We next examine Pearson and Hawkins's arguments that venue was not proper in the Southern District of Illinois. We review claims of improper venue to determine "whether the government proved by a preponderance of the evidence that the crimes occurred in the district charged, viewing the evidence in the light most favorable to the government." *United States v. Ochoa*, 229 F.3d 631, 636 (7th Cir. 2000). Article III of the Constitution stipulates that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," § 2, cl. 3, and the Sixth Amendment similarly requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." These Constitutional conditions also are echoed in Federal Rule of Criminal Procedure 18, which dictates that a criminal prosecution must occur "in a district in which the offense was committed." Because the wire fraud statute does not contain a specific statutory venue provision, the general venue provision for offenses that occur in more than one state or district, 18 U.S.C. § 3237(a), applies here: "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

Defendants contend that the substantive wire fraud count should not have been tried in the Southern District of Illinois because the basis for that count, a wire transfer from a bank in the Eastern District of Pennsylvania to a bank in the Northern District of Illinois, did not originate in, pass through, or terminate in the Southern District of Illinois. In cases interpreting the application of § 3237(a), this court has held that "venue is only improper 'if the only acts that occurred in that district do not provide evidence of the elements of the charged crime.'" *United States v.*

Ringer, 300 F.3d 788, 792 (7th Cir. 2002) (quoting *Ochoa*, 229 F.3d at 636).

In *Ringer*, the defendant was charged with making false statements to federal officers in the Eastern District of Kentucky and was tried in the Southern District of Indiana. *Id.* at 790. We held that venue was proper in the Southern District of Indiana because, although the statements occurred elsewhere, they were intended to influence a trial set to occur in the Southern District of Indiana, and the materiality of the statements was an element of the crime. *Id.* at 792. Similarly, in *United States v. Frederick*, 835 F.2d 1211, 1212 (7th Cir. 1987), venue was proper in the Northern District of Illinois when a defendant was charged with witness tampering that occurred in the Southern District of Florida but was intended to affect a trial in the Northern District of Illinois. We explained that "[p]roper venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act is intended to have an effect in the district where the case is finally brought, venue is proper." *Id.* at 1215.

In the instant case, defendants intended to defraud customers in the Southern District of Illinois. They were charged with wire fraud, including use of the wires to promote the sale of defective batteries through false advertising in the Southern District of Illinois. Moreover, the defective batteries themselves were distributed and sold in that district, and an audit of the battery quality conducted in the Southern District of Illinois initially uncovered the defects in the product. The Exide Corporation, a defendant in a companion case, was charged with similar crimes and pled guilty in the Southern District of Illinois.

These fraudulent activities conducted in the Southern District of Illinois provided critical evidence of the "intent to defraud," an element of the crime of wire fraud. *See*

United States v. O'Brien, 119 F.3d 523, 532 (7th Cir. 1997); *see also* 18 U.S.C. § 1343. The Supreme Court has emphasized that when analyzing venue, courts must inquire into the nature of the offense, *see United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (upholding venue in prosecution of firearm offense where crime of violence, an essential element of the firearm offense, occurred in the trial district), and Pearson and Hawkins's crime of wire fraud focused on defrauding and concealing their deceit of consumers, including those in the Southern District of Illinois.[3]

Hawkins also complains that venue was improper as to the conspiracy count. Both the sale of defective batteries and the broadcasting of advertisements in the Southern District of Illinois were overt acts that supported the charge of conspiracy to commit mail fraud. "As long as one overt act in furtherance of the conspiracy was committed in a district, venue is proper there." *United States v. Molt*, 772 F.2d 366, 369 (7th Cir. 1985). Venue for both the conspiracy and substantive wire fraud counts was proper in the Southern District of Illinois.

C. Discovery and Pretrial Rulings

Defendants also raise several objections to pretrial rulings by the district court, and we review their complaints keeping in mind that "[d]istrict courts have broad discretion in discovery matters." *Packman v. Chicago Tribune Co.*, 267

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[3] Although neither party discusses the case, in *United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002), the Ninth Circuit held that venue for a wire fraud offense may only "lie where there is a direct or causal connection to the . . . wires." This approach differs with the rubric we have established for analyzing venue in *Frederick*, *Ochoa*, and *Ringer*, and we decline to adopt the analysis outlined by the Ninth Circuit in *Pace*.

F.3d 628, 646 (7th Cir. 2001). We review discovery challenges for abuse of discretion, and "[w]e shall not reverse the district court's ruling absent a clear showing that the denial of discovery resulted in actual and substantial prejudice to [defendants]." *Id.* at 646; *see also United States v. Avery*, 208 F.3d 597, 601 (7th Cir. 2000). We note at the outset that the government maintained an open-file policy in this case, by which defendants, through their copy vendor, could copy all of the government's records, and the district court observed that defendants had "extraordinary access" to documents in this case. Furthermore, defendants have failed to show actual prejudice from any of the issues they have raised with the discovery process. Despite this fatal flaw, we will briefly discuss their contentions for the sake of completeness.

We first review the district court's rejection of defendants' motion for a continuance. In late January 2002, Pearson moved for a trial continuance, the third such request made by defendants. Defendants argue that they needed more time to prepare for trial because 86 boxes of discovery material had not yet been copied by defendants' copy vendor, and because of the large volume of documents. Importantly, defendants do not argue that the government did not make the 86 boxes of documents available to them, only that the log maintained by the U.S. Postal Inspector's Office to account for the government boxes being taken for copying by defendants' copy vendor indicated that 86 boxes had not yet been copied.[4] After providing defendants free and open access to the documents through its open-file policy, the government was under no obligation to ensure

[4] Defendants also complain about an additional 23 boxes that the log indicates were received by defendants' copy vendor, but of which defendants did not receive copies. This seems to be a problem more properly addressed to the copy vendor, not to the court.

that defendants took advantage of the open files by actually copying or reviewing each box. Further, although there was a large amount of discovery to review in preparation for trial, defendants had one year from the date of the first superceding indictment and seven and one-half months from the date of the second superceding indictment to prepare for trial. We do not find any abuse of discretion in the district court's denial of defendants' motion for a continuance, as defendants had adequate time and access to discovery in order to prepare for trial.

Second, we consider defendants' argument that the district court should have required the government to provide defendants with a list of potential witnesses and a list of its trial exhibits. Despite the fact that Federal Rule of Criminal Procedure 16 addresses many of the defendants' concerns, their briefs are noticeably silent as to the Rule's provisions. Federal Rule of Criminal Procedure 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents . . . or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

As we have noted before, the law is clear that neither the Constitution nor Rule 16 entitles a defendant to a list of all prospective witnesses before trial in a noncapital case. *See United States v. Napue*, 834 F.2d 1311, 1317 (7th Cir.

1987).[5] The district court may require the government to provide a witness list, *see United States v. Edwards*, 47 F.3d 841, 843 (7th Cir. 1995); *United States v. Jackson*, 508 F.2d 1001, 1006 (7th Cir. 1975), but, as Congress recognized when it declined to include such a requirement in Rule 16, a district court may also choose not to exercise that prerogative, since providing a witness list might in some cases discourage witnesses from testifying or lead to "'improper contact directed at influencing their testimony.'" *Napue*, 834 F.2d at 1317 (quoting H.R. CONF. REP. NO. 94-414 (1975), *reprinted in* U.S.S.C.A.N. 674, 713, 716). With respect to the provision of an exhibit list, defendants admit that they received copies of the exhibits themselves, and they limit their complaint to the lack of a list of the exhibits to aid in their organization for trial. As noted earlier, Rule 16 requires the government to make certain physical objects and documents available for inspection and copying, but it is silent as to any responsibility by the government to provide an organizational guide to those materials for defendants. Although provision of an exhibit list likely would have made this trial more efficient for all involved, and we certainly encourage parties to exchange them pretrial, we cannot find the district court abused its discretion for failing to order the government to furnish lists that Rule 16 does not require it to provide.[6]

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[5] We note that defendants do not argue that the government failed to comply with the Jencks Act, 18 U.S.C. § 3500(b), which requires the government, upon defendants' motion, to produce statements made by any of its witnesses which the particular witnesses signed, adopted, or approved, and which pertain to their testimony at trial. Instead, defendants' argument focuses on the provision of a list of witnesses before they took the stand.

[6] Because the government did provide the district court with a courtesy copy of an exhibit list, defendants also argue that the

(continued...)

Next, defendants argue that the district court erred in rejecting their motion to compel the production of approximately 3800 allegedly-defective batteries that the government obtained from Sears. Defendants allege that, despite the fact that the batteries were never introduced at trial, the government's refusal to turn over the batteries compromised their ability to defend against the accusation that the batteries were defective because they could not have the batteries tested to determine their quality. The batteries were never analyzed by any party, and the government contends that they could not have been tested because their condition had deteriorated to a point that made reliable testing impossible. Defendants disagree and argue that testing would have been merely difficult, not impossible. Rule 16 requires the government to provide access to objects "which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial." In *United States v. Armstrong*, 517 U.S. 456, 462 (1996), the Court held that "material to the preparation of the defendant's defense" means "the defendant's response to the Government's case in chief," and does not include materials deemed by defendants to be necessary to prove their own defense theory or to challenge the pros-

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[6] (...continued)
government's failure to provide them with the same list constituted *ex parte* communication in violation of *United States v. Culp*, 7 F.3d 613 (7th Cir. 1993). *Culp* rightly noted that the government has a professional obligation under ABA Model Rule of Professional Conduct 3.5(b) to provide a copy to defense counsel of "any papers, documents or exhibits he files with the court in order to avoid an *ex parte* contact with the judge." *Id.* at 616 n.1. Despite the fact that defendants' *ex parte* argument misses the mark—no information was hidden from them since they had copies of the exhibits themselves—we emphasize that simply providing a copy of the exhibit list to the defendants would have avoided this unnecessary dispute.

ecutor's conduct of the case. Defendants argue that even though the 3800 batteries were not part of the government's case, test results could have been used to respond generally to the government's allegations that the batteries were defective. But even if we assume that the batteries could have been tested and we assume that defendants could have used test results to defend against the government's case in chief under *Armstrong*, it is difficult to imagine how defendants could have suffered actual prejudice from the lack of access to the batteries. When Exide pled guilty, it stipulated that the batteries were manufactured and distributed with latent defects. On the other hand, we fail to see what harm could have come from the government turning over the batteries. But given the uncertainty about the condition of the batteries and Exide's stipulation that the batteries were in fact defective, we do not think the district court's denial of defendants' motion to compel the batteries rises to an abuse of discretion.[7]

Finally, defendants allege that the government improperly failed to turn over several documents in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In order to establish a *Brady* violation, defendants must show "(1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995). Defendants offer three "examples" of *Brady* violations, but in each case fail to articulate why the evidence sought was not available to defendants

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[7] Defendants also object to the district court's refusal to compel production of a CD-Rom holding battery data. The CD-Rom contained an inventory of manufacturing codes and internal serial numbers that were placed on the batteries. We do not see how this information is relevant to defendants' case, and we find no error in the district court's decision to deny defendants' motion to compel.

through the exercise of due diligence. *See United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002). They first point to the government's refusal to turn over the grand jury testimony of Tim Findlay, who, according to Pearson, coordinated an Exide management buy-out plan to purchase Kmart's auto centers. Putting aside their failure to explain the relevance of Findlay's grand jury testimony to the case at bar, the district court found, and defendants do not dispute, that Findlay was available to be called as a witness for the defense. Defendants' other *Brady* allegations are equally unconvincing. They posit that the government should have turned over the debriefing notes of a co-defendant who pled guilty and agreed to cooperate with the government, and that it should have provided the grand jury testimony of defendant Hawkins's son, Lee Hawkins. These strike us as witnesses who would be easily available to defendants, and defendants have not explained to the contrary. Under these circumstances, we find no error under *Brady* in the district court's refusal to order the government to turn over these materials.

D. Impeachment Evidence

Defendants further contend that the district court erred when it did not allow defendants to introduce certain documents in their cross-examination of Joseph Calio. Evidentiary rulings by the district court are reviewed by this court for abuse of discretion. *United States v. Nedza*, 880 F.2d 896, 903 (7th Cir. 1989). Calio generally testified that he was obtaining money for bribes through wire transfers from Exide and covering it up by signing backdated documents that provided false reasons for the wires. He was also a key witness against Pearson, and he described Pearson's active role in the conspiracy. At trial, defendants attempted to introduce documents that they claim would have provided a legitimate explanation for the wire trans-

fers that Calio testified were fictitious. These documents included airline tickets for European travel in 1995, a passport showing that Calio landed in London in 1995, and an American Express statement including a charge for plane tickets, which defendants apparently sought to support a theory that Calio used the money wired to him by Exide to purchase a personal vacation to Europe rather than to bribe Marks. The government argued that there was no connection between the documents and the bribe money wired to Calio. The district court agreed, finding the documents would be very misleading to the jury, and relied on Federal Rules of Evidence 403 and 608(b) to exclude them. Given the district court's factual finding that the documents were unrelated to the fraudulent transfer, we find no abuse of discretion in the district court's exclusion of the potentially misleading documents. *See United States v. Thomas*, 321 F.3d 627, 630 (7th Cir. 2003) ("The balancing of probative value and prejudice is a highly discretionary assessment, and we accord the district court's discretion great deference, only disturbing it if no reasonable person could agree with the ruling."); *Chase v. Consol. Foods Corp.*, 744 F.2d 566, 571 (7th Cir. 1984) ("Since the trial judge has the feel of the jury in a way that the appellate court cannot, his ruling [excluding potentially misleading evidence] will rarely be disturbed on appeal.").

Defendants also contend that the court erred in ending the defense's examination of Calio. The court excused Calio from the witness stand after a hearing in chambers in which the government argued that Pearson's attorney suggested to Calio's counsel that Calio may have breached his plea agreement with the government, that he should assert his Fifth Amendment privilege against self-incrimination, and the defense would then move to strike all of Calio's testimony. At the time the district court ended Calio's testimony, Calio had testified as a government witness for three days, including substantial cross-examination

by defendants, and had then been recalled by defendants as a witness for the defense. Defendants claim that, as a result of the court's ruling, they did not have the opportunity to examine Calio as to certain conversations he had with government witness Rick Randalls, although defendants do not explain the significance of this evidence or why it had not been discussed with the witness earlier.

During the three and one-half days Calio had been on the stand, the defense had ample opportunities to impeach Calio on many different issues. "Merely cumulative evidence is excludable, as having little probative value, Fed. R. Evid. 403; merely cumulative impeachment evidence likewise." *United States v. Boyd*, 55 F.3d 239, 246 (7th Cir. 1995). Defendants thoroughly questioned Calio on issues including discrepancies in his accounts of alleged meetings with the defendants, misstatements in a deposition with the Florida Attorney General, tax evasion, his possible bias against Pearson including statements that he "hated Pearson" and had commented on Pearson's sexual orientation, and the fact that he received a deal from the government for his testimony. They do not explain why additional testimony from Calio would have been anything but cumulative. "Determining whether testimony is cumulative rests within the sound discretion of the district court," *United States v. Gardner*, 211 F.3d 1049, 1055 (7th Cir. 2000), and we find no abuse of discretion by the district court in ending Calio's testimony.

Hawkins and Pearson raised a number of other issues in their appeals, and although we have considered each of these arguments, we conclude that they are without merit and are of insufficient importance to discuss here.

III. CONCLUSION

Accordingly, we AFFIRM the convictions and sentences of the defendants.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit